IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDCITION

CRIMINAL APPEAL NO.840 OF 1990

The State of Maharashtra ... Appellant
(Orig. complainant)

Versus

1. Bajarang Tukaram Gopale
2. Jaising Tukaram Gopale ... Respondents
(Orig. Accused Nos. 1 and 2)

Shri P.A. Pol for the State
Mrs. Revati Mohite-Dere Advocate for the Respondents

CORAM : D.G. DESHPANDE, & S.R. SATHE,JJ.
DATED : 6th MARCH,2007

ORAL JUDGEMENT :- (PER S.R.SATHE,J.)

1. The State of Maharashtra has preferred this appeal against the judgement and order passed by the Court of 4th Additional Sessions Judge, Pune in Sessions Case No. 113/1989 whereby both the accused were acquitted of the offences punishable under sections 302, 323 r/w. 34 of IPC.

2. The brief facts giving rise to this appeal are as under :-

The complainant Bhamabai Govind Khaire was residing at village Mukhai, Taluka Shirur, District Pune alongwith her husband Govind and son Subhash. The accused Nos.1 and 2 in this case are the brothers of

each other. They are having their land adjoining to the land of the complainant's husband Govind. About two and half years prior to the incident, complainant's daughter Vimal was murdered. The present accused, their father and complainant's husband's brother Shivaji and Maruti were charged for the murder of Vimal. The present accused were, however, acquitted by the Trial Court in the said case and rest of the accused were convicted. However, subsequently, they were also acquitted in the appeal.

3. On 15/09/1988, the complainant's husband Govind PW-3 had gone to Pune to sell vegetables. Complainant's son Subhash (deceased in the instant case) was serving in ISPAD Company which is about 8 to 10 kms. away from village Mukhai. On 16/09/1988, at about 3.00 pm complainant returned from their field and then again at about 5 or 5.15 pm she went to their field called Damadi for collecting fuel. When she was proceeding to that field she saw accused Nos.1 and 2 coming from the direction of the well of one Pandharinath and proceeding towards their house. At that time, accused No.1 was having a spade in his hand. It is complainant's case that after she collected fuel and returning home her son Subhash met her on the way and

he asked her as to whether she had broken Tal which was in the field called Damadi. Complainant replied in the negative and told Subhash that as it was raining they would see about the same on the next day morning. She, therefore, proceeded towards her house while Subhash went towards the Tal. After she reached home she heard shout “mother-mother”. She, therefore, immediately rushed towards the Tal and she found that accused Nos. 1 and 2 were pressing her son Subhash in the water of Tal. Then complainant raised shouts. The accused No.1 told her not to shout and pressed her mouth and gave a kick on her waist. As a result of this, complainant got frighten and went towards the village Mukhai. On the way, her husband Govind met her. Naturally, she narrated the incident to him. Then both of them went to the house of one Pralhad Dhumal and narrated the incident to him. As it was raining, he advised them to go to the Police Station. Accordingly, complainant, her husband and Pralhad went to the Police Station of Talegaon, Dhamdhere and informed the Police about the incident. PSI on duty made entry in the station diary and then all of them proceeded towards village Mukhai. However, there was some hurdle in reaching Mukhai as there was heavy water in the stream and they could not cross the same immediately. Naturally, they waited

there for some time and when water came to normal level, they crossed the stream and went to the place of offence. The Police searched the place in the torch light and they found the dead body of Suresh in the water of Tal. Police then drew the Inquest Panchanama and sent the dead body for postmortem. They also recorded complaint of the complainant and on the said basis registered the offence at C.R. No.67 of 1988 against the accused for the offences mentioned above.

4. Police then recorded statements of the witnesses, obtained postmortem report. They searched for the accused but they were not found. Ultimately, they were arrested on 18/10/1988. In the mean time, police had also sent the complainant for her medical examination and attached the clothes of the deceased. When accused No.1 was in the police custody, he made a statement before police that he would point out the place where the spade was concealed and accordingly, memorandum was drawn and then the spade was seized at the instance of the accused No.1 and panchanama to that effect was also drawn. Police then sent the attached property to C.A.

5. After completion of the investigation, Police

submitted the charge-sheet against the accused in the Court of JMFC, Ghodnadi. Finding that the accused were charge-sheeted for the offence punishable under section 302 of IPC which was exclusively triable by the Court of Sessions, the learned JMFC committed the case to the Sessions Court, Pune.

6. The learned 4th Additional Sessions Judge, Pune framed charge Exh-6 against the accused. The charge was read over and explained to the accused. Both the accused pleaded not guilty and claimed to be tried. From the suggestions put to the prosecution witnesses and statement of the accused recorded as per section 313 of Cr.P.C. it appears that the defence of the accused is of total denial. It is their contention that as they were acquitted in the earlier Sessions Case which was filed against them on the allegation of the charge of committing murder of complainant's daughter Vimal, false case has been filed against them.

7. In order to bring home the guilt of the accused, prosecution examined in all six witnesses consisting of panch witness PW-1 Chandrakant Raikar Exh-17, PW-2 Medical Officer Dilip Salunkhe Exh-19 who did the postmortem on the dead body of Subhash, PW-3

Govind Khaire father of the deceased Exh-25, PW-4 complainant Bhamabai Khaire Exh-28 alleged eye witness, PW-5 Pralhad Dhumal Exh-30 and Investigating Officer PSI Dinkar Suryawanshi Exh-32. Prosecution also produced inquest panchanama Exh-12, panchanama of clothes of the deceased Exh-13, arrest panchanama Exh-15, attachment of the clothes of the accused Exh-16, panchanama of place of offence Exh-18, P.M. Notes Exh-20, medical certificate of Bhamabai Exh-21, complaint Exh-29, panchanama regarding attachment of spade Exh-42, C.A. Reports Exh-44 and 45.

8. After considering the prosecution evidence, learned Trial Judge came to the conclusion that the conduct of the witness Bhamabai Khaire Exh-28, Govind Khaire Exh-25 was unnatural and there were several contradictions and discrepancies in the evidence of complainant and her testimony is not reliable and can not be accepted in the absence of any other corroborating evidence. Naturally, he acquitted the accused.

9. Being aggrieved by the order of acquittal, State has filed the present appeal. In this appeal before us, Shri Pol, learned APP has urged three

points. Firstly, he submitted that the learned Trial Judge has not properly appreciated the evidence on record. Secondly, he canvassed before us that the learned Trial Judge ought to have considered the fact that complaint was lodged by the mother of the deceased who is an eye witness, within few hours from the incident and she had also sustained injury, so, her testimony ought to have been accepted. Lastly, he submitted that it is clear from the evidence that the accused were absconding for a long time after the incident and taking into consideration all these facts the learned Trial Judge ought to have held that prosecution has proved the offence beyond reasonable doubt. He, therefore, submitted that appeal be allowed and both the accused be convicted for the offence with which they are charged. As against this, Mrs. Revati Mohite-Dhere learned Advocate for the accused supported the judgement and order passed by the learned Trial Judge. She submitted that the evidence of the complainant Bhamabai in fact shows that she had not actually seen the alleged incident and her testimony is not worthy of credence. She, therefore, submitted that appeal be dismissed.

10. It is not in dispute that the accused persons

are residing near the field of the complainant's husband. It is also an admitted fact that in the case of the murder of complainant's daughter Vimal, the present accused as well as their father and brother of the complainant's husband were accused and the present accused were acquitted in the said case. It is also not in dispute that on 16/09/1988 at night when police and complainant and her husband went to the field in question, they found dead body of complainant's son Subhash in the water of Tal and when the said dead body was sent for the postmortem, Doctor found following injuries on the person of Subhash.

Incise wounds over scalp five in numbers :

(a) Frontal site- 8cms x 1 cm. Muscle deep.

(b) Frontal site 4 ½ cms x 1 cm. Muscle deep.

(c) Left parietal site- 3 cms. x 1 cm., bone deep.

(d) Left parietal site-2 cms x 1 cm, bone deep.

(e) Right parietal site – 3cms x 2 cms x 2 cms. bone deep.

All the injuries are antimortem,

were caused within 12 hours by hard and sharp cutting object.

(2) On internal examination, he found -

Crack fracture both right and left parietal bones on palpation. Blood oozing through the site.

On right parietal – vertical, about 3 cms. in length.

On left parietal – vertical crack fracture two in numbers each about 3 cms. in length.

(1) Laceration of brain right parietal region size- 3 cms. in length and ½ cm. in depth x ½ cm. in breadth. Age within-12 hrs.

(2) Laceration of brain left parietal region. Size-3 cms. length x ½. cm. in depth x ½ cm. breadth.

(3) Laceration of brain left parietal region size – 2 cms. length x 3 m.m. in depth x 2 cms. width.

Doctor has opined that the death was caused due to shock due to severe head injury. Thus, from the postmortem report Exh-20 and the evidence of Doctor Salunkhe which is at Exh-19, it is crystal clear that

the death of Subhash was homicidal. This point is in fact not disputed by the accused.

11. The main and the material question is whether injuries that were found on the person of Subhash were caused at the hands of the accused. In order to prove that the same were caused at the hands of the accused, prosecution is mainly relying on the evidence of complainant Bhamabai Khaire, an alleged eye witness Exh-28 and other two witnesses namely Govind Khaire Exh-25, Pralhad Dhumal Exh-30 to whom the complainant had immediately told the names of the assailants.

12. Admittedly, there is nothing on record to indicate that there was any dispute on account of property or boundary between the complainant and the present accused. However, admittedly, the present accused were charge-sheeted for having committed murder of complainant's daughter Vimal and in that case, they were acquitted by the Trial Court. So, it is quite possible that as a result of the same, the complainant may be having some grudge and grievance against the present accused. Naturally, when such is the position we have to scrutinize the evidence of complainant with great care and caution and see whether the same is

worthy of credence and establishes beyond reasonable doubt that the accused assaulted the deceased Subhash and caused his death. Prosecution witness No.4 complainant Bhamabai Exh-28 has stated in her deposition that on 16/09/1988 in the afternoon, she had gone to the field for collecting fuel. This in fact appears to be improbable in view of the fact that admittedly on that day, there were rains. It is common experience that during the rainy period one is not likely to collect fuel. It appears that she has stated that when she was returning after collecting wood, accused Nos. 1 and 2 were seen by her on the way and at that time, accused No.1 was having a spade in his hand. However, it is pertinent to note that she has admitted in cross-examination that in her statement before Police i.e. in complaint, it is not mentioned that at the relevant time the accused No.1 was holding spade in his hand. This is certainly a material contradiction. No satisfactory explanation is given by the complainant as to why she did not state before police that just prior to the incident, she had seen the accused No.1 with spade in his hand. It is pertinent to note that she has tried to develop a story that when she heard shouts, she went towards the Tal and at that time, accused assaulted the deceased and pressed her into the

water of the Tal. However, if we carefully read the evidence of complainant Bhamabai we find that she has nowhere specifically stated that at the relevant time the accused were seen by her while assaulting the deceased. All that she has said is “I reached near the Tal, I saw the accused Nos. 1 and 2 pressing Subhash in the water of Tal”. So, one thing is certain that even the alleged eye witness has not actually seen the present accused while assaulting the deceased. Question arises whether her version that she saw the accused Nos. 1 and 2 pressing the deceased in the water of Tal is true or not. Firstly, it must be noted that Tal is not adjacent to the house of the complainant. So, it is difficult to believe that the complainant would listen the shouts of her son when she was in her house. Besides this, if we see the subsequent conduct of the complainant, then also her version appears to be totally improbable. According to her when she reached near Tal after seeing the accused pressing Subhash in the Tal, she raised shouts and then accused No.1 pressed her mouth and gave a kick to her and as such she went towards the village. It is her say that on way she met her husband and she narrated the incident to him. If this had happened then certainly both of them would have immediately rushed towards the Tal. It has

also come on record that near from the Tal and in between the place where the complainant met her husband and Tal there are some other fields and houses but we find that neither the complainant nor her husband approached to any of those persons and they did not raise any shout for help. On the contrary, we find that according to them they went to the field of Pralhad Dhumal. What is more to be noted is that even after informing about the incident to Dhumal then also instead of going to the place where the alleged incident was going on, they all went to the Police Station. This conduct of the above mentioned three prosecution witnesses and in particular that of complainant and her husband is totally unnatural and as such unacceptable. It is pertinent to note that in the cross-examination the complainant has clearly stated, " Police inquired with me, against whom I suspect, and I told the names of present accused." This itself shows that even while lodging the FIR the complainant has in fact not stated that she had actually seen the incident and that is why police asked her as to whether she was having any suspicion against any one and she told the names of the accused. So, this statement of the complainant in cross-examination also clearly establishes that the complainant had in fact not

actually seen the accused while assaulting or even while pressing the deceased in the water. So, we are not inclined to accept the uncorroborated testimony of the complainant Bhamabai Khaire as well as her husband Govind Khaire.

13. It is true that the Prosecution has brought on record the medical certificate of complainant Bhamabai. From the perusal of the said certificate Exh-21, it appears that Dr. Salunkhe examined her on 17/09/1988 and they found following injuries on her person.

1) Superficial abrasion at chin 4 cms. X 2 cms. Hard and blunt weapon.

2) Blunt injury at sacral region. The injuries were caused by hard and blunt object and the injuries were simple.

The injury No.1 was caused within 24 hrs. However, Doctor Salunkhe could not determine the age of the injury No.2.

Doctor has stated that above injuries are simple. When we find that her other evidence is not at all reliable merely because some minor injuries or abrasions were found on the person of complainant. We can not jump to the conclusion that her version is true

or that she has actually seen the incident.

14. An attempt was also made to show that the death of Subhash might have been caused by the accused by forcible pressing him into the water. However, if we read the evidence of Dr. Salunkhe which is at Exh-19 we find that he has clearly opined that in the instant case death was not due to drowning. So, this also negatives the version of the complainant that she saw the accused pressing Subhash in the water of the Tal.

15. The prosecution has examined Pralhad Dhumal at Exh-30. However, he has turned hostile. He has also not stated that at the relevant time the complainant named the present accused as the assailants. So, the evidence of Pralhad Dhumal is also of no use to the Prosecution.

16. A feeble attempt has been made on behalf of the Prosecution to show that the accused No.1 produced the spade or rather the spade was discovered at his instance. Firstly, it must be noted that it is alleged that the spade was discovered from the grass near from the place of offence. Besides the evidence of Investigating Officer, there is absolutely no evidence to show that accused No.1 made a statement before

Police while in their custody that he would point out the place and accordingly memorandum was drawn. It is not even established that when the spade was attached, the accused No.1 was present there. There is no proper discovery of the weapon in question and the evidence in that behalf is rightly discarded by the learned Trial Judge.

17. Much is made about the fact that after the alleged incident, the accused were not traced for a long time and they were in fact absconding. The learned APP strenuously argued before us that it is a very important circumstance which suggest that the accused must be the guilty persons. It is true that PSI Suryawanshi has stated that though he made an attempt to search the accused they were not traced till 18/10/1988. However, it is well settled that absconding of accused by itself can not be considered to be a circumstance which alone is sufficient to jump to the conclusion that the accused is the real culprit. The person may abscond due to several reasons. Ofcourse if there is other credible evidence to show involvement of the accused in the alleged crime then absconding of the accused lends support to the prosecution case. However, it is well settled that in the absence of any direct,

cogent, convincing, reliable evidence to prove the guilt of the accused the absconding by itself has no importance. So, when we find that the evidence of the alleged eye witnesses and the persons to whom the disclosure was made about the names of the assailants was not reliable and trustworthy, the learned Trial Judge rightly ignored the evidence with regard to absconding. Thus, in our considered view the learned Trial Judge has rightly acquitted the accused. The finding of the learned Trial Judge is not shown to be unreasonable, improbable, perverse or illegal. So, under such circumstances, there is absolutely no necessity to interfere with the finding of the learned Trial Judge. Hence we pass the following order :-

O R D E R

The appeal is dismissed.

The bail bonds of the accused stand cancelled.

(D.G. DESHPANDE,J.)

(S.R. SATHE,J.)